

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ENGLEWOOD HOSPITAL AND
MEDICAL CENTER,

Plaintiff,

v.

AFTRA HEALTH FUND,

Defendant.

Civil No. 06-00637 (HAA)

REPORT AND RECOMMENDATION

This matter comes before the Court on the motion of the plaintiff, Englewood Hospital and Medical Center, to remand the action to the Superior Court of New Jersey, Bergen County. The motion was opposed by defendant AFTRA Health Fund. Oral argument was heard on August 10, 2006. For the reasons set forth on the record and transcribed in the attached transcript, it is respectfully recommended that this action be remanded to the Superior Court of New Jersey, Bergen County.

Dated: August 23, 2006


Hon. Mark Falk
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ENGLEWOOD HOSPITAL & MEDICAL
CENTER,

Plaintiffs,

vs.

AFTRA HEALTH FUND,

Defendants.

Docket No. 06-0637 (HAAAXMF)

Newark, New Jersey 07102

August 10, 2006

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE MARK FALK
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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I N D E X

1 MOTION TO REMAND AND FOR COUNSEL FEES

2 THE COURT:

3 Decision

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Colloquy

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1 THE COURT: All right, good morning, counsel. This
2 is the case of Englewood against AFTRA Health Fund, which is
3 ~~Civil Action No. 06-637~~. Would counsel place their appearances
4 on the record, please?

5 MR. KASSAR: Yes, Your Honor, good morning. Camille
6 Joseph Kassar, K-A-S-S-A-R, Maloof, Lebowitz, Connahan &
7 Oleske, on behalf of the plaintiff.

8 MS. GOMEZ: Good morning, Your Honor. My name is
9 Lisa Gomez. I'm here with my associate, Suzanne D'Amato.
10 We're from the Law Firm Cohen, Weiss & Simon, and we're here
11 representing the defendant, The AFTRA Health Fund.

12 THE COURT: All right. Before the Court are two
13 motions, which I believe have been referred to me for
14 consideration. One is the motion to remand the case to the
15 State Court, and there's also a request for attorneys' fees as
16 part of that motion. I have read the papers. I am familiar
17 with the arguments. Would anyone like to be heard on this?

18 MR. KASSAR: Your Honor, Your Honor is very well
19 familiar -- very familiar with this issue. There are other
20 cases you've handled accordingly. Unless the Court has
21 specific questions, for me, I don't have anything to add to the
22 moving papers, Judge.

23 THE COURT: Thank you.

24 MS. GOMEZ: Guess also we've pretty much taken up
25 your -- part of your docket with these cases over the past few

Colloquy

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1 months, and I think that we've covered -- I think that
2 everything has been covered amply in the papers. I would like
3 ~~to just to emphasize on the -- particularly on the independent~~
4 legal duty point, if Your Honor has any questions as to that
5 point, I would be happy to answer those questions.

6 THE COURT: Okay. I don't have any specific
7 questions about the law involved necessarily. I do want to
8 raise with you, it seems to me that there are a group of cases
9 consolidated before Judge Lifland. Are anyone familiar with
10 those?

11 MS. GOMEZ: Certainly, Your Honor.

12 MR. KASSAR: Yes, Your Honor.

13 THE COURT: And those involve the same issue, don't
14 they?

15 MR. KASSAR: Yes, Your Honor.

16 MS. GOMEZ: Yes, Your Honor.

17 THE COURT: So I guess what I would wonder is there
18 -- are there any cases, other cases -- I know there are some
19 new cases that have just been filed. But -- an some other
20 cases that have been decided. Seem to be a lot of cases
21 raising this issue. Has any other case proceeded to the point
22 where it's headed back to the Circuit, or anything like that?

23 MR. KASSAR: Not back to the Circuit, Judge.

24 THE COURT: Oh, just to --

25 MR. KASSAR: They're having decisions by, I think,

Colloquy/The Court

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1 Judge Wallace, where the case was remanded.

2 THE COURT: Yes.

3 MR. KASSAR: ~~On~~--- and there were, I believe,

4 Magistrate Hedges remanded two other cases, as well, Judge.

5 We heard there were three cases argued on the same
6 day before Judge Hedges, and I don't have the specifics in
7 front of me, but two were remanded with essentially the consent
8 of defense counsel, Judge. Because they did not feel that the
9 Federal Court still had jurisdiction over the case, Your Honor.

10 On the remaining case where Ms. Gomez and I were
11 adversaries, I believe, Judge Hedges has agreed to defer to
12 Judge Lifland's findings on that issue, if I'm not mistaken.

13 MS. GOMEZ: I don't know, my understanding as to
14 Judge Hedges was that he reserved decision. But I don't know
15 that he specified that we had oral argument before Judge
16 Hedges, I want to say it was April or May, and he reserved
17 decision on the remand issue. We have not, yet, received an
18 opinion.

19 As Mr. Kassar states there have been other cases that
20 have been before this Court, and they have been remanded. But,
21 to my knowledge of those cases, they've either been at the
22 consent of defense counsel, or defense counsel did not respond
23 to the motion to remand. Or I believe there's one -- there
24 would be one or two cases where there was no evidence of an
25 assignment presented in those cases, so they were decided on

Colloquy/The Court

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1 those grounds.

2 THE COURT: Okay, very well. Thanks, you can have a
3 seat.

4 MR. KASSAR: Thank you, Judge.

5 THE COURT: As I said, I have read the briefing,
6 which was quite good. But the basics is -- this is a motion to
7 remand. The premise of the motion is the contention that this
8 is a State breach of contract claim, which is predicated on a
9 legal duty that's independent of E.R.I.S.A. And thereby, there
10 is no Federal jurisdiction and the case should be remanded to
11 the State Court.

12 Now, I do want to make clear on the record that I am
13 treating this as a report and recommendation to Judge Ackerman,
14 since it involved remand. The Third Circuit, I think, has made
15 clear that that is something that is considered dispositive.
16 Although, there was a time when it was not, the Magistrate
17 Judges did it directly.

18 I'm taking the unusual step, and I will explain this
19 to Judge Ackerman to render a decision on the record, rather
20 than in writing in this case. In part due to my -- the number
21 of cases that I'm handling, the fact that this motion
22 apparently has been around for some time, and also due to a
23 personal matter. So, I thought since it's rather
24 straightforward in some respects, I would do this more quickly,
25 and simply render my decision on the record today.

The Court

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1 So back to it, we have the remand motion and some
2 background. On December 13th, 2005 the Englewood Hospital and
3 Medical Center ~~filed a complaint~~ in the Superior Court of New
4 Jersey, Bergen County. First calendar complaint set forth a
5 breach of contract claim against the AFTRA Health Fund.
6 Basically, some of the background facts are the plaintiff
7 contracted with Multi-Plan, Inc. to become a preferred provider
8 organization, and provide discounted hospital fees to patients
9 covered by health plans, which contracted with Multi-Plan. The
10 defendant also contracted with Multi-Plan as a health plan to
11 receive access to discounted rates provided to Multi-Plan
12 subscribers at the covered hospitals.

13 Under the terms of the contracts between Multi-Plan
14 and the plaintiff, health plans were only eligible for reduced
15 fees provided they paid claims within a certain amount of time.
16 And plaintiff apparently now claims that defendant after
17 determining eligibility and coverage failed to pay the claims
18 in a timely manner. So there's a claim of unjust enrichment.

19 On February 9th, 2006, defendant filed a notice of
20 removal, pursuant to 28 U.S.C. 1441, defendant provided the
21 grounds for removal that the plaintiff's complaint was governed
22 by Section 502a1B of E.R.I.S.A, 29 U.S.C. 1132a1B over which
23 the District Court has original jurisdiction under Section
24 1331.

25 So, just to summarize the factual background again,

The Court

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1 the hospital, of course, is a hospital providing medical
2 services to the public. The hospital entered into a contract
3 with Multi-Plan. ~~Agreed to become a member of a PPO Network to~~
4 accept this kind of payments for group health coverage.
5 Services provided to subscribers subject to considerations
6 detailed in the contract between hospital and Multi-Plan.

7 Defendant provides group health coverage to its
8 members, and through a contractual relationship with Multi-
9 Plan, the defendant accesses discounted rates for services. In
10 order to receive those rates defendant had to comply with
11 certain conditions, which include payment within the time plan.

12 I think that this case involves claims relating to
13 two individuals for services rendered by the hospital. The
14 defendant allegedly failed to make payment within the required
15 time period to be eligible for the discounted rate. The
16 hospital claims it's entitled to the full bill charges, and
17 asserted this cause of action to seek the balance due in owing
18 to the defendant.

19 According to the plaintiff, the Court is not really
20 being asked, and I think the Court agrees, to address any
21 issues of benefit availability under the E.R.I.S.A. plan. The
22 issue involves the alleged failure to make timely payment to
23 the hospital in order to qualify for the discount. Thus, the
24 claim is -- the plaintiff's claim is that the Court lacks
25 necessary jurisdiction to maintain the matter in Federal Court.

The Court

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1 As stated previously, this is one of many cases, many
2 identical cases filed in this Court, that seem to be at various
3 stages. But the issue appears to be very similar, if not
4 identical in all those cases. Very simply, the precise issues
5 raised on this motion were considered and decided upon in a
6 precedential Third Circuit decision in which the District Court
7 was reversed. This is a case that I had some Magistrate Judge
8 case management involvement in. But the Third Circuit reversed
9 the District Court and found that the nearly identical case
10 should be remanded to the Superior Court.

11 That case, as we all know, is the Pascack Valley
12 Hospital, Inc. v. Local 444 UFCW Welfare Reimbursement Plan,
13 388 F. 3d. 393. There's also been another Third Circuit case
14 of some importance, Community Medical Center v. Local 44A, 143
15 F. 3d. 433. And there's been various District Court decisions
16 in the Third Circuit, and certainly in the new -- District of
17 New Jersey following those cases, some of which have been
18 alluded to here.

19 One decision that was attached to one of the papers,
20 addressed the issue in a very simple fashion. This was the
21 Bayonne Medical Center v. Local Three Bakers case, Docket 05-
22 5846, in which Judge Greenaway issued an order and said, and I
23 quote from the order, "In Community Medical Center and Pascack,
24 the Third Circuit held that a breach of contract suit against
25 an employee welfare plan by a hospital is not removable as

The Court

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1 arising under the Federal common law of E.R.I.S.A., because the
2 hospital did not have standing to bring a suit under E.R.I.S.A.
3 ~~And because the plaintiff's breach of contract claims were~~
4 predicated on a legal duty that was independent of E.R.I.S.A."
5 Community Medical Center and Pascack were signed -- I mean were
6 cited, and Judge Greenaway continues the same reasoning applies
7 here and the outcome must be the same. Other judges in this
8 district have decided the same issue based on the same rather
9 simple statement. And that really could, to some extent, end
10 the inquiry here.

11 However, there have been certain other issues raised
12 in this case, so I will address them. But to really place
13 everything in context, you get back to Pascack Valley, and
14 there's no advantage to having the Magistrate Judge trying to
15 paraphrase or to state the holding and the area dict statement
16 of the law in Pascack Valley. And I think that would be un --
17 inefficient and unnecessary for me to try to put into my own
18 words. But to place things in context, I'll simply quote at
19 some length from the Pascack case, because it informs the
20 Court's recommendation here, and also places in context for
21 Judge Ackerman the issue at hand.

22 Pascack sets out the law beginning at the beginning,
23 "A civil action," I'm quoting, "filed in the State Court may be
24 removed to the Federal Court, if the claim is one arising under
25 Federal Law. Under the Well Pleadod Complaint Rule the

The Court

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1 plaintiff is ordinarily entitled to remain in State Court so
2 long as its complaint does not, on its fact, affirmatively
3 ~~allege a Federal claim."~~ ~~I'm leaving the cites out.~~ "Federal
4 preemption is ordinarily a defense to a plaintiff's suit, and
5 as such does not appear on the fact of a well pleaded
6 complaint." In the Pascack Valley case, which I think is
7 similar here, the hospital's complaint does not present a
8 Federal question, rather the complaint states -- asserts State
9 Common Law claims for breach of contract. The complaint does
10 not expressly refer to E.R.I.S.A, and the rights for immunities
11 created under E.R.I.S.A. are not elements, let alone essential
12 elements of the plaintiff's claims. The possibility or even
13 likelihood that E.R.I.S.A.'s preemption provisions, Provision
14 29 U.S.C. 1144a may preempt the hospital State claims is not a
15 sufficient basis for removal.

16 Now, to go on here. Although the, and I'm skipping
17 around, but still quoting from Pascack. "Although the well
18 pleaded complaint rule would ordinarily bar the removal of an
19 action to Federal Court where Federal jurisdiction is not
20 presented. On the face of the plaintiff's complaint, the
21 action may be removed if it falls within the narrow class of
22 cases to which the doctrine of complete preemption applies."
23 That citing the recent Aetna Health, Inc. v. Daverler
24 (phonetic), 542 U.S., I don't have the page, but it's the
25 United States Supreme Court case of 2004. And the question is

The Court

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1 raised as to E.R.I.S.A.'s Civil Enforcement Provision, Section
2 502, which is described in Pascack as one of those provisions
3 with such ~~extraordinary~~ preemptive power ~~that it~~ converts an
4 ordinary State Common Law complaint into one stating a Federal
5 claim for purposes of the Well Pleased Complaint Rule.

6 The Supreme Court when faced with that kind of an
7 issue, whether it's within the scope, and therefore preempted
8 and removable, has recently clarified the inquiry in such
9 cases. It follows that if an individual brings suit
10 complaining of a denial of coverage for medical care, where the
11 individual is entitled to such coverage only because of the
12 terms of an E.R.I.S.A. regulated employee benefit plan, and
13 where no legal duty, State or Federal, independent of
14 E.R.I.S.A. or the plan terms is violated, then the suit falls
15 within the scope of 502a1B.

16 In other words, if an individual at some point in
17 time could've brought his claim under E.R.I.S.A. 502a1B, and
18 where there's no other independent legal duty that is
19 implicated by a defendant's actions, then the individual cause
20 of action is completely preempted by E.R.I.S.A. And then you
21 really get to the crux of the decisional issue in this case.

22 Accordingly, quote, "This case is removable only if,
23 one, the hospital could have brought its breach of contract
24 claim under Section 502a, and, and underscored, two, no other
25 legal duty supports the hospital's claim." Of course, at that

The Court

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1 point the Court then concluded the hospital could not have
2 brought its claims under 502a, and there's an extensive
3 discussion of that. -- 502a, the statute is limited to
4 participants and beneficiaries. So in Pascack the Court found
5 that the hospital had failed to establish -- the defendant
6 failed to establish that the hospital could've brought its
7 claim under 502, because based on the Court's finding that the
8 hospital did not have standing to sue under E.R.I.S.A because
9 there was no evidence in the record. This was the PASCACK
10 VALLEY rationale that the hospital was one of the enumerated
11 parties permitted to bring a claim under 502a.

12 The third -- the Court in Pascack Valley did state
13 that the Third Circuit had not resolved whether a hospital can
14 establish standing to sue under 502a of E.R.I.S.A., based on an
15 assignment of a claim from a participant or beneficiary. But
16 didn't address that issue because it found that there was no
17 actual evidence of an assignment in the record.

18 Plaintiff argues that the hospital could have -- I'm
19 sorry. The defendant argues that the hospital could have
20 brought its claim under E.R.I.S.A. 502a, because unlike the
21 hospital in Pascack Valley, in this case, it is clear that the
22 hospital holds a valid assignment for both claims that relate
23 to this action. And evidence of that assignment has been
24 placed in the record.

25 The defendant points out that the Pascack Valley

The Court

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1 Court noted, quote, "almost every Circuit to have considered
2 the question has held that a health care provider can assert a
3 claim under 502a, where ~~a beneficiary or participant has~~
4 assigned to the provider the individual's right to benefits
5 under the plan." That's true, almost every Circuit, but not
6 the Third Circuit, at this time, at this point. And that issue
7 is -- is out there.

8 But getting back to it, the crux of the case, I said,
9 is whether the hospital could bring the case under 502a, and
10 more importantly that no other legal duty supports the
11 hospital's claim.

12 Now, the Court is not of the view that the presence
13 or absence of record of the -- anything in the record regarding
14 the assignment is dispositive of the issue here. However, even
15 if that were the case, and even if there was Third Circuit
16 authority, the Court finds that the defendant still cannot
17 maintain Federal jurisdiction. Because the second prong of the
18 analysis cannot be met. The Third Circuit in Pascack Valley
19 held, quote, "We further conclude that the hospital's State Law
20 claims are predicated on a legal duty that is independent of
21 E.R.I.S.A." citing Daverler. The crux of the parties dispute
22 is the meeting basically of the subscriber agreement. I left
23 some language out from the quote. " For coverage and
24 eligibility disputed, interpretation of the plan might form an
25 essential part of the hospital's claims. However, coverage and

1 eligibility do not seem to be in dispute in this case. The
2 resolution of the lawsuit requires the interpretation of the
3 subscriber agreement, ~~not the plan. The hospital's right to~~
4 recovery, if it exists, depends entirely on the operation of
5 contracts that are independent of the plan itself, or arguably
6 independent."

7 The Third Circuit does some analysis of this, and
8 they refer to a 9th Circuit case, and they say, quote, "We find
9 instructive the 9th Circuit's opinion in Blue Cross California
10 v. Anesthesia Care Associates Medical Group, 187 F. 3d 104-5."
11 In that case, the Court held that claims asserted by health
12 care providers against the health care plan for breach of their
13 provider agreements were not completely preempted. The Court
14 reached the conclusion notwithstanding the fact that these
15 medical providers obtained assignments of benefits from
16 beneficiaries of the E.R.I.S.A. covered health care plans. The
17 Court held that the provider's claims were not claims for
18 benefits under E.R.I.S.A. plans. The providers are asserting
19 contractual breaches that their patients assignors could not
20 assert the patients are simply not parties to the provider
21 agreements. The dispute is not over the right to payment, but
22 the amount.

23 So, to summarize, I think plaintiff's argument that
24 the main distinction between this case and Pascack is that in
25 that case there was no evidence of an assignment in the record,

The Court

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1 and here there is evidence of an assignment, but is unavailing
2 for a variety of reasons.

3 ~~First of all, the Third Circuit has remanded all such~~
4 claims that I've seen and that have been brought to the
5 attention of this Court, and certainly, the District Court has
6 done so as well. Despite references to assignments, and we
7 just heard that reference actually from Pascack Valley.
8 Although, Pascack Valley passed on the assignment issue because
9 it wasn't in the record.

10 But more importantly, the second prong, as I stated,
11 cannot be overcome in which the Pascack Court said, we
12 conclude that the hospital State Law claims are predicated on a
13 legal duty that is independent of E.R.I.S.A. The hospital
14 claims to be sure or derived from an E.R.I.S.A. plan and exist
15 only because of that plan. The crux of the parties dispute is
16 the meaning of the agreement, the contract that goes to the
17 discounted rates. So, the hospital's right to recovery, if it
18 exists, depends on the operation of those third party contracts
19 executed by the plan.

20 I do also want to note in Pascack Valley that
21 Justice, then Judge Alito issued a concurrence. And he did
22 make reference to the fact that the issue really hadn't been
23 decided in this Circuit. However, the Court's reading of his
24 concurrence suggests clearly that the formality, at least in
25 Justice Alito's mind or view, was relatively unimportant.

1 Justice Alito states that in Pascack the Court very well could
2 have and should have assumed an assignment was made. Because
3 ~~he goes on to say, it's sort of obvious or common that that is~~
4 the way that these cases and proceed, not so much these cases,
5 but that's the way the business interaction proceeds. By
6 concurring in the remand and the judgement, Judge Alito made
7 clear his conclusion, that the action should be remanded
8 despite what he would, I think, refer to as an assumed
9 assignment. And I think Judge Alito's concurrence contradicts
10 the defendant's argument, well not binding, certainly
11 contradicts the defendant's argument that assignment, the
12 record evidence of the assignment is a dispositive legal issue.

13 Finally, the Court will deny the request for counsel
14 fees and sanctions. Although, Pascack is out there, we see
15 that there is a tremendous amount of litigation since. There
16 was a legitimate issue raised in this case. It was a
17 legitimate, factual difference in this case about the presence
18 of an assignment, and a difference of opinion over the law. So
19 this is in no way a frivolous matter, and there's no right to
20 counsel fees in the Court's view.

21 Therefore to conclude, the Court respectfully
22 recommends to District Judge Ackerman that the plaintiff's
23 motion to remand be granted, and the motion for counsel fees be
24 denied. I'm going to order a copy of the transcript of this
25 report and recommendation, which should be available within a

The Court - Decision/Colloquy/
Certification

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1 couple of days, and appended to my report and recommendation to
2 Judge Ackerman. Of course, I remind the parties of what the
3 rules provide for responding to, if anyone sought to or
4 objecting to the report and recommendation. That's all.

5 Anything further, counsel?

6 MR. KASSAR: No thank you, Your Honor.

7 THE COURT: Okay.

8 MR. KASSAR: Thank you, Judge.

9 THE COURT: Thank you very much.

10 MS. GOMEZ: Thank you, Your Honor.

11
12 (Proceeding concluded)

13 Certification

14 I, Patricia Wtulich, assigned transcriber, certify that
15 the foregoing is a correct transcript from the official
16 electronic sound recording of the proceedings in the above-
17 entitled matter.

18
19 Patricia Wtulich

8-12-06

20 Signature of Assigned Transcriber

Date

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CERTIFICATION

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